

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Victoria Whitaker

v.

Philadelphia Gas Works

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C-2022-3035783

INITIAL DECISION

Before
F. Joseph Brady
Administrative Law Judge

INTRODUCTION

This Initial Decision dismisses the Formal Complaint of a gas service customer seeking a payment arrangement because the customer failed to carry her burden of proving that she is entitled to a new or subsequent Commission-issued payment arrangement.

HISTORY OF THE PROCEEDING

On September 30, 2022, Victoria Whitaker (Complainant or Ms. Whitaker) filed a Formal Complaint (Complaint) with the Pennsylvania Public Utility Commission (Commission) against Philadelphia Gas Works (PGW, Company, or Respondent). In the Complaint, the Complainant placed checkmarks in the boxes indicating: “The utility is threatening to shut off my service or has already shut off my service” and “I would like a payment agreement.” The Complainant also alleged that her outstanding balance should not include a balance transfer that occurred in 2018.

On October 24, 2022, PGW filed an Answer with New Matter (Answer) along with a Notice to Plead. In its Answer, PGW admitted in part and denied in part various material allegations of the Complaint. PGW admitted that it issued a shut off notice for the gas service at 6428 Boyer Street, Philadelphia, PA. In its New Matter, PGW averred that the portions of the Complaint regarding the 2018 balance transfer are barred by the statute of limitations at 66 Pa.C.S. § 3314, which provides that no action for recovery of penalties or forfeitures, or any prosecution, may be maintained unless brought within three years from the date the liability arose. PGW requested that the Complaint be dismissed.

Also on October 24, 2022, PGW filed a Preliminary Objection to the Complaint, along with a Notice to Plead. In its Preliminary Objection, PGW reiterated their argument that the portions of the Complaint regarding the 2018 balance transfer are barred by the statute of limitations at 66 Pa.C.S. § 3314 and should be dismissed.

The Complainant's Answer to PGW's Preliminary Objection was due no later than November 3, 2022. 52 Pa.Code §§ 5.101(f)(1), 1.56(a)(1) and (b). The Complainant did not file an Answer to PGW's Preliminary Objection.

By Hearing Notice dated November 29, 2022, an Initial Call-In Telephonic Hearing was scheduled for February 2, 2023, and the matter was assigned to me.

A Prehearing Order was issued on January 9, 2023, advising the parties of the date and time of the scheduled hearing, and informing them of the procedures applicable to this proceeding.

On February 2, 2023, the hearing convened as scheduled. The Complainant appeared *pro se*, testified on her own behalf, and offered no exhibits for the record. Graciela Christlieb, Esquire, appeared on behalf of PGW and presented the testimony of one witness, Jessica Antonetti, a Customer Review Officer at PGW. Ms. Antonetti sponsored five (5) exhibits, which were admitted into the record without objection.

The record closed on March 1, 2023, upon the filing of the transcript with the Commission.

FINDINGS OF FACT

1. The Complainant is Victoria Whitaker.
2. The Respondent is Philadelphia Gas Works, a gas utility under the jurisdiction of the Pennsylvania Public Utility Commission.
3. The Complainant receives gas service from PGW at 6428 Boyer Street, Philadelphia, Pennsylvania (Service Address). Tr. 6.
4. On November 27, 2018, the Complainant requested service from PGW and PGW transferred the outstanding balance from the Complainant's mother, who was the prior customer of record at the Service Address, to the Complainant. New Matter ¶ 8.
5. On August 6, 2019, the Complainant received a Commission-issued payment arrangement (BCS #3722204), based on a household size of one and monthly income of \$3,894. Tr. 20-21; PGW Ex. 4.
6. On August 26, 2019, the Complainant filed an Informal Complaint with the Commission's Bureau of Consumer Services ("BCS") at BCS # 3729350, wherein she disputed the transferred balance.
7. On February 26, 2020, the BCS issued its decision at BCS #3729350, wherein it dismissed the Informal Complaint.
8. The Complainant did not appeal the BCS decision at BCS # 3729350.

9. The Complainant defaulted on the August 6, 2019, Commission-issued payment arrangement. Tr. 22; PGW Ex. 3.

10. The Complainant resides alone at the Service Address. Tr. 7.

11. The Complainant's current gross income is approximately \$4,342 per month. Tr. 7.

12. The Complainant's current total household income of \$4,342 per month exceeds 375% of the Federal poverty level for a household size of one.¹

13. The Complainant's total outstanding balance, as of the date of the hearing, was \$9,109.02. Tr. 18; PGW Ex. 2.

DISCUSSION

Preliminary Objection

The Commission's Rules of Administrative Practice and Procedure provide for the filing of Preliminary Objections. 52 Pa. Code § 5.101. Commission Preliminary Objection practice is comparable to Pennsylvania civil practice respecting the filing of preliminary objections. *Equitable Small Transp. Intervenors v. Equitable Gas Co.*, Docket No. C-00935435 (Opinion and Order entered July 18, 1994). The Commission's Rules provide, in relevant part:

§ 5.101. Preliminary objections.

(a) *Grounds.* Preliminary objections are available to parties and may be filed in response to a pleading except motions and prior preliminary objections. Preliminary objections must be

¹ See, HHS Poverty Guidelines, 87 Fed. Reg. 14, 3316 (Jan. 21, 2022); <https://aspe.hhs.gov/sites/default/files/documents/98087be2f7c9586ee24c35a011bc7ac8/guidelines-1983-2023.xlsx>.

accompanied by a notice to plead, must state specifically the legal and factual grounds relied upon and be limited to the following:

- (1) Lack of Commission jurisdiction or improper service of the pleading initiating the proceeding.
- (2) Failure of a pleading to conform to this chapter or the inclusion of scandalous or impertinent matter.
- (3) Insufficient specificity of a pleading.
- (4) Legal insufficiency of a pleading.
- (5) Lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action.
- (6) Pendency of a prior proceeding or agreement for alternative dispute resolution.
- (7) Standing of a party to participate in the proceeding.

52 Pa. Code § 5.101(a).

In deciding the preliminary objections, the Commission must determine whether, based on well-pleaded factual averments of the Complainant, recovery or relief is possible. *Dept. of Auditor Gen. v. State Emp.'s Ret. Sys.*, 836 A.2d 1053 (Pa. Cmwlth. 2003); *P.J.S. v. Pa. State Ethics Comm'n*, 669 A.2d 1105 (Pa. Cmwlth. 1996). Any doubt must be resolved in favor of the non-moving party (Ms. Whitaker) by refusing to sustain the preliminary objections. *Boyd v. Ward*, 802 A.2d 705 (Pa. Cmwlth. 2002). All of the non-moving party's averments in the complaint must be viewed as true for purposes of deciding the preliminary objections, and only those facts specifically admitted may be considered against the non-moving party. *Ridge v. State Emp.'s Ret. Bd.*, 690 A.2d 1312 (Pa. Cmwlth. 1997).

In this case, the Complaint contains an allegation that the Complainant's outstanding balance should not include a balance transfer that occurred in 2018. Complaint ¶ 4.²

² Under the "Other" section of "Reason for Complaint," the Complainant stated: "Bills of previous owner should not be passed on to new owner as well."

PGW's position is that this issue is beyond the Commission's jurisdiction as the Commission lacks jurisdiction over claims that are beyond the statute of limitations set forth in 66 Pa.C.S. § 3314.

The Commission, as a creation of the General Assembly, has only the powers and authority granted to it by the General Assembly contained in the Public Utility Code. *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791 (Pa. 1977). Thus, the Commission must act within, and cannot exceed, its jurisdiction. *City of Pittsburgh v. Pa. Pub. Util. Comm'n.*, 43 A.2d 348 (Pa. Super. 1945). Jurisdiction may not be conferred by the parties where none exists. *Roberts v. Martorano*, 235 A.2d 602 (Pa. 1967). Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy. *Hughes v. Pa. State Police*, 619 A.2d 390 (Pa. Cmwlth. 1992). To this end, the Commission has consistently held that Section 3314 of the Public Utility Code, 66 Pa.C.S. § 3314, "is non-waivable because it terminates the right to bring an action as well as any remedy the Commission may order." *Kovarikova v. Pa. Am. Water Co.*, Docket No. C-2017-2592131, p. 16 (Opinion and Order entered Aug. 23, 2018). Specifically, Section 3314 provides:

§ 3314. Limitation of actions and cumulation of remedies.

(a) General Rule. No action for the recovery of any penalties or forfeitures incurred under the provisions of this part, and no prosecutions on account of any matter or thing mentioned in this part, shall be maintained unless brought within three years from the date at which the liability therefore arose, except as otherwise provided in this part.

66 Pa.C.S. § 3314(a).

Here, the date at which this alleged liability arose is older than three years, and thus, barred by the statute of limitations. It is undisputed that the balance transfer occurred on November 27, 2018. Therefore, the Complainant had until November 27, 2021, to timely raise her Complaint. Even factoring in the periods of time that the statute of limitations tolled due to the Complainant's Informal Complaint, any cause of action on this issue is still beyond the

statute of limitations.³ As a result, Section 3314(a) divests the Commission of jurisdiction to hear the Complainant's action on the balance transfer. Accordingly, this issue was stricken from the Complaint at the outset of the hearing. Tr. 5-6.

Payment Arrangement

Section 332(a) of the Public Utility Code provides that the party seeking relief from the Commission has the burden of proof. 66 Pa.C.S. § 332(a). As a matter of law, a complainant must show that the named utility is responsible or accountable for the problem described in the complaint in order to prevail. *Patterson v. Bell Tel. Co. of Pa.*, 72 Pa.P.U.C. 196 (Opinion and Order entered Feb. 8, 1990); *Feinstein v. Phila. Suburban Water Co.*, 50 Pa.P.U.C. 300 (Opinion and Order entered Oct. 6, 1976). Such a showing must be by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600 (Pa. Cmwlth. 1990). A complainant can meet that burden if he presents evidence more convincing, by even the smallest amount, than that evidence presented by Respondent. *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950). The offense must be a violation of the Public Utility Code (Code), a Commission Regulation or Order, or a violation of a Commission-approved tariff. 66 Pa.C.S. § 701.

The decision of the Commission must be supported by substantial evidence. 2 Pa.C.S. § 704. "Substantial evidence" is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & W. Ry. Co. v. Pa. Pub. Util. Comm'n*, 413 A.2d 1037 (Pa. 1980); *Erie Resistor Corp. v. Unemployment Comp. Bd. of Rev.*, 166 A.2d 96 (Pa. Super. 1961); *Murphy v. Pa. Dep't of Pub. Welfare, White Haven Ctr.*, 480 A.2d 382 (Pa. Cmwlth. 1984).

If a complainant establishes a *prima facie* case, the burden of going forward with the evidence shifts to the utility. If a utility does not rebut that evidence, the complainant will

³ The Complainant's Informal Complaint at BCS Docket No. 3729350 was open from August 26, 2019, to February 26, 2020; 184 days. The addition of those days pushes the statute of limitations deadline from November 27, 2021, to May 30, 2022.

prevail. If the utility rebuts the complainant's evidence, the burden of going forward with the evidence shifts back to the complainant, who must rebut the utility's evidence by a preponderance of the evidence. The burden of going forward with the evidence may shift from one party to another, but the burden of proof never shifts; it always remains on the complainant. *Milkie v. Pa. Pub. Util. Comm'n*, 768 A.2d 1217 (Pa. Cmwlth. 2001); *see also, Burtleson v. Pa. Pub. Util. Comm'n*, 443 A.2d 1373 (Pa. Cmwlth. 1982).

In the instant matter, the Complainant request a second Commission-issued payment arrangement. The Responsible Utility Customer Protection Act, 66 Pa.C.S. §§ 1401–1419, applies to complaints alleging inability to pay and requesting a Commission-issued payment arrangement. This law provides strict guidelines that the Commission must follow when determining whether a payment arrangement can be issued. Section 1405(a) of the Public Utility Code reads as follows:

§ 1405. Payment arrangements

(a) GENERAL RULE.-- The commission is authorized to investigate complaints regarding payment disputes between a public utility, applicants, and customers. The commission is authorized to establish payment arrangements between a public utility, customers, and applicants within the limits established by this chapter.

66 Pa.C.S. § 1405(a).

However, Section 1405(d) of the Public Utility Code regarding payment arrangements reads in pertinent part:

(d) Number of payment arrangements.

Absent a change in income, the commission shall not establish or order a public utility to establish a second or subsequent payment arrangement if a customer has defaulted on a previous payment arrangement established by a commission order or decision. A public utility may, at its discretion, enter into a second or subsequent payment arrangement with a customer.

66 Pa.C.S. § 1405(d). "Change in income" is defined as:

A decrease in household income of 20% or more if the customer's household income level exceeds 200% of the Federal poverty level or a decrease in household income of 10% or more if the customer's household income level is 200% or less of the Federal poverty level.

66 Pa.C.S. § 1403(emphasis added). Thus, the Commission may only order a subsequent payment arrangement if the Complainant demonstrates a decrease in income.

In this case, the Complainant was already the beneficiary of a payment arrangement issued by the Commission on August 6, 2019, which was based on a gross monthly income of \$3,894 and a household size of one. The Complainant defaulted on this Commission-issued payment arrangement. During the hearing, the Complainant confirmed that, rather than a decrease in household income since the Commission-issued payment arrangement, her income has increased from \$3,894 to \$4,342 per month. Therefore, since the Complainant has not experienced a change in income as defined by 66 Pa.C.S. § 1405(d), the Commission cannot establish or order PGW to issue another payment arrangement.

Also, the Complainant is not entitled to an extension of the Commission-issued payment arrangement. Section 1405(e) of the Public Utility Code regarding payment arrangements reads in pertinent part:

(e) Extension of payment arrangements.

If the customer defaults on a payment arrangement established under subsections (a) and (b) as a result of a significant change in circumstance, the commission may reinstate the payment arrangement and extend the remaining term for an initial period of six months. The initial extension period may be extended for an additional six months for good cause shown.

66 Pa.C.S. § 1405(e)(emphasis added). “Significant change in circumstance” is defined as:

Any of the following criteria when verified by the public utility and experienced by customers with household income less than 300% of the Federal poverty level:

- (1) The onset of a chronic or acute illness resulting in a significant loss in the customer's household income.
- (2) Catastrophic damage to the customer's residence resulting in a significant net cost to the customer's household.
- (3) Loss of the customer's residence.
- (4) Increase in the customer's number of dependents in the household.

66 Pa.C.S. § 1403 (emphasis added).

Here, the Complainant did not present any evidence that she defaulted on the Commission-issued payment arrangement as a result of a significant change in circumstances. Additionally, the Complainant's household income is greater than 300% of the Federal poverty level. Consequently, the Commission may not reinstate the payment arrangement issued on August 6, 2019, and extend the remaining term.

Conclusion

Based on the foregoing, I find that the Complainant has failed to carry her burden of proving that she is entitled to a second or subsequent Commission-issued payment arrangement or to an extension of the previous payment arrangement. Accordingly, the Complaint is dismissed.

CONCLUSIONS OF LAW

1. The Commission's Rules of Administrative Practice and Procedure provide for the filing of Preliminary Objections. 52 Pa. Code § 5.101.
2. Preliminary objections are available to parties and may be filed in response to a pleading when the Commission lacks jurisdiction. 52 Pa. Code § 5.101(a)(1).

3. Any action for the recovery of any penalties or forfeitures incurred under the Public Utility Code must be brought within three years from the date at which the liability therefore arose. 66 Pa.C.S. § 3314(a).

4. This Commission lacks jurisdiction to hear the Complainant's action on the 2018 balance transfer. 66 Pa.C.S. § 3314.

5. This Commission has jurisdiction over the parties to and remaining subject matter of this case. 66 Pa.C.S. § 701.

6. The burden of proof in this proceeding is upon the Complainant. 66 Pa.C.S. § 332(a).

7. Any finding of fact necessary to support the Commission's adjudication must be based upon substantial evidence. *Mill v. Pa. Pub. Util. Comm'n*, 447 A.2d 1100 (Pa. Cmwlth. 1982); *Edan Transp. Corp. v. Pa. Pub. Util. Comm'n*, 623 A.2d 6 (Pa. Cmwlth. 1993); 2 Pa.C.S. § 704.

8. The Responsible Utility Customer Protection Act, 66 Pa.C.S. §§ 1401-1419, applies to this proceeding.

9. The Commission is authorized to establish a payment arrangement between a public utility and a customer. 66 Pa.C.S. § 1405(a).

10. The Commission shall not establish or order a public utility to establish a second or subsequent payment arrangement if a customer has defaulted on a previous payment arrangement established by a commission order or decision absent a change in income. 66 Pa.C.S. § 1405(d).

11. If a customer defaults on a payment arrangement established by the Commission under subsections 1405(a) and (b) as a result of a significant change in

circumstance, the commission may reinstate the payment arrangement and extend the remaining term for an initial period of six months. The initial extension period may be extended for an additional six months for good cause shown. 66 Pa.C.S. § 1405(e).

12. “Significant change in circumstance” is defined as: “Any of the following criteria when verified by the public utility and experienced by customers with household income less than 300% of the Federal poverty level: (1) the onset of a chronic or acute illness resulting in a significant loss in the customer's household income; (2) catastrophic damage to the customer's residence resulting in a significant net cost to the customer's household; (3) loss of the customer's residence; (4) increase in the customer's number of dependents in the household. 66 Pa.C.S. § 1403.

13. The Complainant has failed to carry her burden of proving that she is entitled to a second or subsequent Commission-issued payment arrangement or to an extension of the previous payment arrangement. 66 Pa.C.S. §§ 1405(d), (e).

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Preliminary Objection of Philadelphia Gas Works is granted consistent with the above discussion.

2. That the Complaint of Victoria Whitaker at Victoria Whitaker v. Philadelphia Gas Works, Docket No. C-2022-3035783 is dismissed.

3. That Docket No. C-2022-3035783 be marked closed.

Date: May 25, 2023

_____/s/_____
F. Joseph Brady
Administrative Law Judge